IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 607

FRANK J. ANDREWS, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY MEMORANDUM

The thrust of the prosecution's arguments suggest that a few words in reply on behalf of the petitioner Andrews will be helpful.

First. Both parties agree that, although the defense regularly brought to the trial judge's attention virtually daily headlines that contained prejudicial and inadmissible matter, and requested that the jurors be

examined to ascertain whether any of them had read the offending articles, the judge refused to do so, insisting that the instructions he had given the jury were adequate (Pet. 5-6; Br. Op. 15-17).[1]

On this state of facts, the government argues (Br. Op. 17) that "the trial court acted well within its discretion in refusing to interrogate the jurors."

Our point, and no less than six circuits agree with us and disagree with the court below, and the government is that a trial court has no discretion when, as here, (a) the articles are prejudicial and (b) immediate request for interrogation of the jury is made. On such a showing, the trial judge must as a matter of law make inquiry.

1. We have already (Pet. 17-18) cited decisions from the District of Columbia, Second, Third, Fourth, and Seventh Circuits laying down the foregoing rule. Since then, the Seventh Circuit has reaffirmed the principle (*United States* v. *Largo,* 346 F. 2d 253, certiorari denied Nov. 5, 1965, No. 469, this Term), dividing only on whether the jurors should have been examined singly, out of the presence of all the others, or whether sequestration during interrogation was unnecessary. And the Fifth Circuit has adopted the majority rule, saying (*Adjmi* v. *United States,* 346 F. 2d 654, 659, certiorari denied October 11, 1965, No. 314, this Term).

> "When during the course of the trial counsel for the appellants brought to the court's attention the prejudicial newspaper accounts and moved for a

[1] "Pet." without more should be understood to refer only to the petition for certiorari filed on behalf of the Petitioner Andrews in No. 607.

> mistrial, the court had a duty to inquire whether the articles had created prejudice in the minds of the jurors."

Significantly enough, the Fifth Circuit in *Adjmi* did not follow its earlier ruling in *Estes* v. *United States,* 335 F. 2d 609, certiorari denied, 379 U.S. 964, which was cited below (Pet. App. 10A) and on which the prosecution still relies here (Br. Op. 17). For there, as we have pointed out (Pet. 18), there was no request until after the close of the evidence that any inquiries be directed to the jurors.

2. Also significantly, the Fifth Circuit in *Adjmi* specifically relied on and cited an earlier decision of the court below, *Marson* v. *United States,* 203 F. 2d 904 (C.A. 6). For it was the Sixth Circuit that pioneered and that until very recently consistently applied the doctrine (*Briggs* v. *United States,* 221 F. 2d 636, 640; *Stone* v. *United States,* 113 F. 2d 70, 77) that

> "The question is, not whether any actual wrong resulted * * * under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice."

It was only with *Sheppard* v. *Maxwell,* 346 F. 2d 707, 723-724, certiorari granted Nov. 15, 1965, No. 490, this Term, that the court below for the first time undertook to consider as discretionary what up to then it had held to be the mandatory duty of the trial judge, viz., to interrogate the jurors on request, once improper newspaper publicity had been brought to his attention, whether they saw the offending items and, if so, whether

they were influenced thereby. And that precise issue is now under review here.[2]

3. The present case is actually a stronger one than *Sheppard,* because since that decision involves collateral review of a State conviction there must be a showing that the impropriety reached constitutional proportions, whereas here, on direct review of a Federal conviction, a lesser showing, of non-adherence to the standards for a fair criminal trial in the courts of the United States, will suffice.

It may be that, so far as the quantum of prejudicial publicity is concerned, "each case must turn on its special facts" (*Marshall* v. *United States,* 360 U.S. 310, 312).[3] But surely there cannot be one rule in the Sixth Circuit and another in six others concerning the trial judge's duty when it is made manifest to him that there has been improper newspaper publicity concerning the case on trial. That question, plainly, requires resolution here, the more so since it is a regularly recurring one. Indeed, three of the cases we have discussed under the present heading—*Largo, Adjmi, Sheppard*—appear in a single volume of the Federal Reporter.

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[2] Among the questions presented in *Sheppard* v. *Maxwell* are these (Pet., No. 490, p. 2):

> "2. Did the trial judge fail adequately to protect the petit jury, once impanelled, from prejudicial extrinsic influence?
>
> "3. Did the trial judge fail to adequately interrogate the jurors when they had been exposed to prejudicial extrinsic matter through the news media during trial?"

[3] Def. Ex. X-4, was a newspaper story about an unsolved murder and unsolved bombings, none of which was referred to in the courtroom. (1823a-1824a)

Second. We showed in detail the course of the judge's charge on hung juries, which he deprecated; on the duty of a jury to reach agreement, which he stated in strong terms; and on reasonable doubt, which he substantially minimized (Pet. 7-10). We showed that those portions of the charge were severally contrary to what is regarded as law elsewhere (Pet. 20-22), and we showed how the impact of the erroneous supplementary charge blasted loose a verdict after the jury had by over three days of deliberation demonstrated its inability to arrive at a verdict without coercion (Pet. 20; R. 2262a-2267a). Yet the case was so close in respect of the present petitioner that he was convicted *only* on the conspiracy count, with the jury in disagreement as to each of the thirty-two substantive counts in which he was named (R. 2267a).

And yet, even though the court below deemed the language of the charge "not * * * desirable," because "it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate," it held that the charge would still pass muster when "viewed in relation to the totality of the Judge's charge on reasonable doubt," (Pet. App. 11A).

Apart from the logical difficulty that "We cannot speculate as to which part would be accepted by the jury * * *" (*Price* v. *United States,* 200 F. 2d 652, 655 (C.A. 5)), and without in any sense undertaking to argue the merits at this juncture, we think that the totality of the foregoing adds up to a question that should be reviewed here.

One, the charge was clearly improperly coercive within this Court's recent ruling in *Jenkins* v. *United States,* 380 U.S. 445, where, significantly, the court of

appeals that was reversed had relied on the change-as-a-whole doctrine (330 F. 2d at 220-221). Two, the most objectionable part of the present charge, to which objection was articulately and specifically made, but without avail (R. 2262a-2263a, 2264a-2265a), came as the judge's last word, on the fourth day of the jury's deliberations. Thus it was most helpful in obtaining a verdict—and most prejudicial to this petitioner. The approach of the court below accordingly runs counter to this Court's teaching in *Bollenbach* v. *United States,* 326 U.S. 607, 612:

> "Particularly in a criminal case, the trial judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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